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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 671

CHARLES SESLAR,

Petitioner,

vs.

UNION LOCAL 901, INC., DALLAS SMITH, RUSSELL L. JOHNSON, RICHARD HURST, MELVIN BORCHERDING, PAULUS ADAMS, CECIL ONION, VIRGIL FOLAND, JOSEPH EDWIN KRAMER, JOHN B. DENNIS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully pray that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The statement of the issues and facts included in the petition for writ of certiorari of the petitioner are so incomplete as to be misleading and we feel that we can best serve the Court by making an entire restatement of the cause.

For purposes of clarity and brevity in this statement of facts, the following abbreviations will be used.

Local 901, United Electrical Radio and Machine Workers of America—CIO, will be designated as Local 901. The United Electrical Radio and Machine Workers of America, the International Union, will be designated as the UE. The International Union of Electrical Radio and Machine Workers, the new CIO International Union, will be designated as the IUE.

On October 6, 1949, the plaintiff, Charles Seslar, a member of Local 901, filed his complaint in the District Court for the Northern District of Indiana wherein he sought a restraining order and permanent injunction. (R. 1-6.) The plaintiff alleged in substance in his complaint that the defendants who were officers of Local 901, a labor union, whose members were employed at the General Electric Company plant at Fort Wayne, had transferred the assets of the Local to a non-profit corporation, which corporation was to hold the assets of the Local for the benefit of all the members of the Local. The plaintiff in said complaint prayed for the following relief: 1. That the defendants and Union Local 901, Inc., the non-profit corporation, be restrained from making any further transfers of the assets of the Local. 2. That the corporation and the individual defendants in their corporate capacities, be restrained from continuing to exercise control and custody of the property of the Local.

3. That they be ordered to transfer all of the property back to the Local.

The plaintiff, in the bringing of this action, did not allege in his complaint that the action was being brought as a class action nor that he was bringing the same on behalf of any other members of the Local. (R. 1-6.) After the filing of the complaint, the defendants filed a motion to dismiss the same on the basis that the requisite jurisdictional amount was not present (R. 7-8), which motion was overruled by the Court without the taking of evidence. Thereupon the defendants answered the complaint denying among other things all allegations pertaining to the jurisdictional amount. After the presentation of the evidence in the cause on November 9, 1949, the Court entered its judgment (R. 12-18) against the defendants and extended to the plaintiff in the cause certain injunctive relief which may be summarized as follows (R. 17-18):

A. The defendants reconvey to Local 901 all of the property conveyed to Union Local 901, Inc.

B. That the individual defendants be permanently enjoined from transferring, in any fashion whatsoever, the assets of Local 901 except that such be done consistent with the constitution of the UE and the constitution and by-laws of Local 901.

The defendants in the action complied with the Court order transferring back to the Local all of the assets theretofore transferred to the non-profit corporation.

Prior to the issuance of this injunction by the District Court, an action was instituted in the Superior Court of Allen County, Indiana, in which action the Local and its officers were made parties plaintiff, and the defendants were the UE, district officers of the International and certain individuals. (R. 365.)

This action was brought to test the ultimate question of the ownership of the assets of the Local. It is to be ob-

served in this connection that in the Superior Court all of the parties necessary to a determination of the ultimate disposition of the assets of the Local were parties to the action and under the jurisdiction of that Court.

While the Superior Court action was pending, on the 20th day of January, 1950, the plaintiff Seslar filed his complaint for relief for acts allegedly in contempt of the Court order heretofore referred to and for other affirmative relief wherein he sought an ultimate disposition of the assets. This was a proceeding for civil contempt. (R. 24-29.) In this proceeding for contempt, the plaintiff prayed for the following relief: 1. That certain moneys paid to the president of the Local for traveling expenses be repaid. 2. That money spent by the Local in payment of per capita to the Indiana State Industrial Union Council, the Fort Wayne Industrial Union Council, and the Allen County Political Action Committee be repaid. 3. Repayment of all money spent for holding a referendum vote and election of officers. 4. That the officers announce that they are no longer officers of the Local and that they turn over to certain alleged temporary officers of the Local all books, records and property of the Local Union.

After the filing of the citation for contempt, the defendants filed their motion to strike the complaint (R. 31-32) on substantially the following grounds: 1. That the plaintiff sought to expand the order of the Court by his prayer for relief. 2. That there is an action pending in the Superior Court of Allen County for the determination of the exact question sought to be determined by the plaintiff in this proceedings, namely, an ultimate disposition of the property of the Local and further that there wasn't a sufficient property right in the plaintiff to bring his contempt proceeding. This motion was overruled by the Court. (R. 72.) Thereafter a hearing was held on the citation for contempt. The evidence in the citation for contempt pro-

ceedings established that a schism had arisen between the Local officers joined by the vast majority of the members on the one hand and the International on the other. This schism arose because of alleged Communist domination of the UE. For that reason the officers of the Local had transferred the assets to a non-profit corporation in order to protect the assets of the Local from a contemplated seizure by the International Union. (R. 219, 244, 247, 251.) The evidence further established that the International Union had been ejected from the Congress of Industrial Organizations, hereinafter referred to as the CIO, with which organization the International had been affiliated for many years (R. 124) and that this expulsion had taken place on November 2, 1949.

Following the hearing of the evidence on the citation for contempt and before the Court handed down its judgment, the Superior Court of Allen County in Cause No. 69135 titled, Local 901, United Electrical Radio and Machine Workers of America and Dallas Smith, *et al. vs.* United Electrical Radio and Machine Workers of America, District Council No. 9 of United Electrical Radio and Machine Workers of America, *et al.*, held that Local 901 was an autonomous unit, that the assets were the property of the Local and its members due to a breach of the constitution or contract by the UE and that the International was permanently enjoined from asserting any title to or interest in the assets of the Local. This order was handed down by the Superior Court on the 21st day of February, 1950. (R. 367-374.) From this judgment no appeal has ever been taken.

Approximately one month thereafter, on the 20th day of March, 1950, the District Court in the case at bar entered its decree judging the respondents guilty of civil contempt and fixed their terms of purgation as follows (R. 361-362): 1. To repay to the treasury the amount of money paid to

Dallas Smith in connection with his trip to Washington, D. C. 2. To file a bond payable to Local 901, UE (which was not a party to the action), in a penal sum equal to the present worth of the assets owned by Local 901 conditioned upon the defendants exercising their control over these assets in such a manner as not to transfer or in any other manner dispose of said assets except as is consistent with the constitution of the UE and by-laws of Local 901. Or as an alternative, the respondents were ordered to relinquish their control over the assets, books and records of Local 901 by transferring the same to the General Secretary-Treasurer of the UE (who was not a party to the action) to be held in trust for Local 901 pending the determination of a proper custodian of these assets on behalf of Local 901. To pay all costs relating to the contempt proceedings, to repay to the treasury of Local 901 all expenses incurred by the respondents including their witness and attorney's fees.

After the entry of the judgment finding the defendants in civil contempt, the defendants filed their motion to vacate the judgment on substantially the following grounds (R. 362): 1. That the Superior Court of Allen County had laid down its decree which was contrary to the order handed down by the Court in the case at bar in the citation for contempt proceedings and that orderly judicial process required this Court to vacate that part of its judgment which was contrary to the decision of the State Court. 2. That the Court had granted relief to parties who were not before the Court, which parties, however, were before the Superior Court. 3. That the original action was one for the transfer back of the assets from a non-profit corporation to the Local and that the order granting relief to the UE (who was not a party to the action) constituted an enlargement of the intendment of the action. 4. That in order to comply with the Court's order defendants would have to act contrary to the order of the Superior Court

theretofore made. The motion to vacate was denied by the Court. Whereupon the defendants filed notice of appeal.

On the 11th day of January, 1951, the United States Court of Appeals for the Seventh Circuit, after hearing argument on the briefs filed in the cause, reversed the holding of the District Court in a written opinion by Chief Judge Major on the basis that the requisite jurisdictional amount had not been established. (R. 399-405.)

REASONS WHY WRIT SHOULD NOT ISSUE.

I.

The decision of the Circuit Court of Appeals is not in conflict with the decision of the Third Circuit Court of Appeals in the case of *Giordano* v. *Radio Corporation of America,* 183 F. (2nd) 558, nor is there a conflict among the decisions of the Circuit Court of Appeals on questions involved in this case.

A. In an action brought by an individual involving jointly held property, the action not being brought on behalf of a class, the interest of all the owners of the property involved may not be aggregated to determine the amount in controversy.

Giordano, etc. v. *Radio Corporation of America,* 183 F. (2nd) 558.

Sturgeon v. *Great Lakes Steel Corporation,* 143 F. (2nd) 819.

Local Union No. 497 v. *Joplin Railway Co.,* 287 F. 473.

Giesecke v. *Denver Tramway Corp.,* 81 F. Supp. 957.

Ayer v. *Kemper,* 48 F. (2nd) 11.

Cowell v. *City Water Supply Co.,* 121 F. 53.

Woods v. *Thompson,* 147 F. (2nd) 951.

B. The value of the interest of a member in the property of an association is predicated upon his per capita share.

Central Mexico Light & Power Co. v. *Munch,* 116 F. (2nd) 85.

Division 525, Order of Railway Conductors of America v. *Garman,* 133 F. (2nd) 273.

C. A Court cannot rewrite a petition converting a suit brought by an individual on his own behalf into a class suit on behalf of a society or unincorporated association in order to establish in the individual the requisite jurisdictional amount.

Bell v. *Preferred Life Assurance Co.*, 131 F. (2nd) 516.

D. A Court may not aggregate speculative future losses in order to arrive at the requisite jurisdictional amount.

Vicksburg S. and P. R. Co. v. *Matlin*, 58 F. (2nd) 979.

Dewar v. *Brooks*, 16 F. Supp. 636.

E. The question of jurisdiction is always before the Court and may be raised for the first time on appeal and may in fact be raised on motion of the Court itself.

Hackner v. *Guaranty Trust Company of N. Y.*, 117 F. (2nd) 95.

Central Mexico Light & Power Co. v. *Munch*, 116 F. (2nd) 85.

Federal Rule 12 (h), 28 U. S. C. A. following sec. 723c.

Mills v. *United Assn. of Journeymen, etc.*, 83 F. Supp. 240.

F. The burden of proving that the requisite jurisdictional amount is involved is on the one who asserts it and not on the one who challenges the jurisdiction of the Court. The test is no different in an injunction action than in any other type of proceeding.

Pingston v. *Brotherhood of Locomotive Firemen & Enginemen*, 69 F. (2nd) 600.

Hackner v. *Guaranty Trust Co. of N. Y.*, 117 F. (2nd) 95.

G. A conviction for civil contempt will be reversed where the Federal District Court lacked jurisdiction of the cause because of the absence of the requisite jurisdictional amount.

Abbott v. *Eastern Mass. St. Ry. Co.*, 19 F. (2nd) 463.
U. S. v. *Walsh*, 174 F. (2nd) 49.
U. S. v. *DeParq, et al.*, 164 F. (2nd) 124.
Beauchamp v. *U. S.*, 76 F. (2nd) 663.

II.

The Circuit Court of Appeals has not decided an important question of local law in a way probably in conflict with applicable local decisions. No question of local law is here presented to the Court. In this petition for writ of certiorari the question is jurisdiction of the Federal Courts as limited by Title 28 U. S. C. A. Sec. 1332.

A. A petition for writ of certiorari will be denied if the court is urged by the petition to grant the writ on the basis of matters not in issue.

Southern Power Co. v. *N. Carolina Public Serv. Co.*, 263 U. S. 508.
Furness W. & Co. v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430.
Layne & B. Corp. v. *Western Well Works*, 261 U. S. 387.

III.

The Circuit Court of Appeals has not decided an important question of federal law which should be settled by this Court. This Court has repeatedly passed upon the questions here presented.

A. If the allegations of jurisdictional facts are challenged, the burden rests on the party asserting such facts to sustain his allegations by competent proof.

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178.

K. V. O. S., Inc. v. *Associated Press*, 299 U. S. 269.

B. The Supreme Court has repeatedly held that plaintiffs suing individually will not be permitted to aggregate the interest of other owners in a joint fund in order to determine the amount in controversy.

Parker v. *Merrill*, 106 U. S. 1.

Thomson v. *Gaskill, et al.*, 315 U. S. 442.

Glenwood Light Co. v. *Mutual Light Co.*, 239 U. S. 121.

IV.

The Circuit Court of Appeals has not decided a federal question in a way probably in conflict with applicable decisions of this Court. No federal question is here involved since the suit did not arise under the constitution or laws of the United States.

V.

The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings, and it did not sanction such a departure by the lower court.

A. Civil contempt proceedings are not entertained for the purpose of vindicating the dignity of the Court. Unlike criminal contempt, civil contempt proceedings are prosecuted for the purpose of protecting private property interests and are ancillary to the main suit. Failure of jurisdiction of a District Court to award a final injunction may be considered by the Court of Review in determining the validity of a civil contempt order based upon said decree.

Gompers v. *Buck Stove Co.*, 221 U. S. 418.
United States v. *United Mine Workers of America*, 330 U. S. 258.
Re Ayers, 123 U. S. 443.

ARGUMENT.

Consideration of the decision of the Circuit Court of Appeals for the Seventh Circuit in the present case will establish that there is not involved in a determination of the granting of the writ of certiorari a fundamental and vital question as to the nature of trade unions as the petitioners would seek to establish by their petition.

The principal question involved is whether the plaintiff's action was properly brought in order to give the District Court jurisdiction. The petitioners would make it appear that the holding in the present case to the effect that the failure of a plaintiff in an action concerning a trade union's assets to bring a class action and join with him sufficient members of the union similarly situated in order to establish jurisdictional amount under Title 28, Sec. 1332 would seriously impair the role of trade unions in the national life of the country.

This is a fallacious argument and predicated upon a false premise. The argument proceeds on the basis that the inability of an individual to bring such an action as the one in question in a federal district court would deprive him of a forum to test his rights in the assets and property of a trade union. Secondly, that since the assets are not divisible, he is, therefore, not required to bring a class action. The union member is not denied a forum to present this question even though he is unable to bring a class action in a federal district court. In the case at bar, it became apparent at the inception of the controversy that all of the parties necessary to a determination of the ultimate resting place of the assets of the union were not before the District Court and therefore it would be necessary to bring another action wherein all the parties would be

before the Court and all the issues would be presented. The Superior Court action therefore resulted, in which action all of the necessary parties were joined and all of the questions were presented. The petitioner's conclusion therefore that a holding requiring the petitioner to bring a class action would deny him a forum is not only a variance from the fact but is disputed by the facts in the present case.

The factual situation in the present case forcibly brings to the Court's attention the necessity of the rule requiring the plaintiff to bring a class action even though the assets are not divisible. Here was a class sharply divided in opinion. The leader of one faction could not adequately represent the whole membership. By the plaintiff's failure to join with him as parties plaintiff other members of the minority group who were in sympathy with his position or to bring a class action so that he represented them resulting in a judgment in the case which would be *res judicata* as far as their interests were concerned clearly establishes the need for the rule. An examination of the facts reveals that in the referendum vote taken on November 6, 1949, there was a vote for the defendants of 2036 and with the plaintiffs 117. (R. 26, R. 109.) The petitioner, in bringing his action without a naming of parties whom he sought to represent or any attempt on his part to hold himself out as representing a certain group by the bringing of a class suit, thereby prevented the Court from adjudicating as far as the rights of the individual parties were concerned who were in sympathy with him.

As pointed out by the Circuit Court of Appeals in its opinion, upon the filing of the complaint, the defendants moved to dismiss the same for lack of jurisdiction, alleging that it was apparent from the face of the complaint that the amount actually in controversy was less than Three Thousand ($3,000.00) Dollars. The motion to dis-

miss was denied without the taking of evidence. Thereupon the defendants answered the complaint denying among other things all allegations pertaining to the jurisdictional amount. Even if the defendants did not raise the question, the question of jurisdictional amount is always before the District Court. It can be raised by the parties to the action or by the Court on its own motion. It may be raised at any stage of the proceedings, where it may become apparent and may be raised by objections to introduction of evidence in the trial court and may also be raised for the first time on appeal. The plaintiff did not establish the requisite jurisdictional amount in the suit to obtain the original injunction upon which the citation for contempt was based, neither did he establish it in his civil contempt proceedings.

The position of the respondents with respect to jurisdictional amount may be briefly summarized as follows: 1. The plaintiff did not bring a class suit, therefore the amount in controversy could not be predicated upon the interest of all the members in the assets of the Local. 2. The test in an injunction action is no different than in any other action even though the suit affects property held by the plaintiff with others. 3. The plaintiff cannot hold himself out as a representative of a class, having an interest in property over Three Thousand ($3,000.00) Dollars if the other parties to the class are not named, and the class is sharply divided in opinion. 4. Even though the property involved is held jointly by the plaintiff with others and his interest is not severable, an action brought by him and not brought on behalf of a class, his interest may not be aggregated with that of the other joint owners to determine the amount in controversy.

It is to be noted that the plaintiff in his action for injunction failed to join the Local or the International as parties plaintiff or defendant. The only parties to the action were

the plaintiff as an individual and the defendants in their corporate capacity and in their individual capacities and the non-profit corporation.

The burden is on the plaintiff to establish jurisdictional amount and never with the defendants who are attacking the sufficiency of the complaint on these grounds. It cannot be argued by the plaintiff that since he was seeking relief relative to all of the property owned by him with other members of Local 901, that the value of the entire assets of the organization should be considered as the amount in controversy. In this connection, the respondents would reiterate that aggregation of the interest of individual owners in jointly held property is required to reach the jurisdictional amount even if the interest of the individual members in the assets of the organization are not separate or divisible. The value of the plaintiff's interest in the assets of the Local is not the total value of all of these assets.

It is therefore apparent that the petitioner did not establish the requisite jurisdictional amount in the suit to obtain the original injunction upon which the citation for civil contempt was based. Neither did he seek to establish it in the contempt proceedings.

The respondents would respectfully point out that the petitioners under their second proposition for reasons for granting the writ cite the following case authority in support of their proposition. These cases consisting of both Federal and State authority are as follows: *Green* v. *Obergfell,* 121 F. (2nd) 46; *Bacon* v. *Paradise,* 63 N. E. (2nd) 571; *Fitzgerald* v. *Abramson,* 89 F. Supp. 504 and *Rosenberg* v. *Chicago Title and Trust Company,* 128 F. (2nd) 245. Also *Low* v. *Harris,* 90 F. (2nd) 783; *Koerner Lodge #6, K. of P.* v. *Grand Lodge, K. of P. of Indiana,* 146 Ind. App. 639; 45 N. E. 1103.

An examination of this authority immediately emphasizes

that the cases are foreign to the question here involved as to jurisdictional amount but are directed to another question, namely the rights of International unions in the assets of their Locals. Since the petitioners have seen fit to encumber their petition with this extraneous matter and thereby attempt to enlarge the issues, the respondents, fully recognizing that this question has no place in the consideration of the petition for writ of certiorari, nevertheless feel required to cite to the Court recent authority arising out of the present controversy and directed to this precise question. *Electrical Workers, Local 1140 (UE)* v. *Electrical Workers, UE* (Minnesota Supreme Court 1950), 45 N. W. (2nd) 408; 27 L. R. R. M. 2177; *Duris* v. *Iozzi*, 70 Atl. (2nd) 793, (1950); *Clark* v. *Fitzgerald*, 93 N. Y. Supp. 768 (1950); *Huntsman* v. *McGovern*, 91 N. E. (2nd) 717 (1950); *Textile Workers Union* v. *Federal Labor Union*, 198 So. 606; *International Union of Brewery Workers* v. *Becherer*, 61 Atl. (2nd) 16.

In order to more chronologically present the position of respondents, the remainder of the argument has been segregated into sections to correspond with the propositions of law heretofore set forth in respondent's brief.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The most recent authority with reference to the particular question raised concerning jurisdictional amount is the case of *Giordano* v. *Radio Corporation of America*, 183 F. (2nd) 558 handed down by the U. S. Court of Appeals for the Third Circuit on July 12, 1950. This decision arose out of the present controversy and treats the precise question here involved. With a view of not unduly enlarging this argument, the respondents would briefly recite only

a brief resume of the facts of the cited case so that they may be related to the language of the Court in its decision.

On January 17, 1950, the plaintiff brought an action in the United States District Court for the District of New Jersey individually and as a treasurer and representative of Local Union 103 of the United Electrical Radio and Machine Workers of America against the Radio Corporation of America, a Delaware Corporation, the employers and members of the Local and John Ledo and Earl Fox, citizens of New Jersey, the president and secretary of the Local respectively, individually and as representatives of the officers and members of the trial board and other members of Local 103 acting in concert with them. It is to be noted in the facts that in the cited case, the plaintiff sought to bring an action which more closely resembled a class action than the plaintiff's case at bar. In the case at bar, the plaintiff sued individually and did not join the UE as party plaintiff. Neither did he join any of the members of the Local as parties plaintiff or defendant with the exception of the officers. The Court pointed out that the theory of the plaintiff's complaint was that it was brought by him as representing a class, the members of Local 103, to prevent them from being deprived of their rights to the services and experiences of officers and fifteen other members who were about to be expelled from membership and further from being deprived of their membership dues. Judge Merris in his opinion states:

> "This brings us to the decisive question, whether the jurisdictional amount of $3000.00 is involved. The court's finding of fact No. 10 is that 'The amount in controversy, exclusive of interest and costs, is in excess of $3000.00.' This finding, however, was predicated upon the court's conclusion that the suit was a class or representative action brought on behalf of the members of the Local under Civil Procedure Rule 23A and that the right of the membership to the services,

experience and dues of the sixteen expelled members was the matter involved. As we have seen, however, this suit is not a proper class suit but must be regarded as having been brought solely to vindicate the plaintiff's individual rights. The district judge in his oral opinion denying the defendant's motion to dismiss the complaint did say that if no proper class action was alleged he was of opinion that 'the rights and liabilities of Giordano alone exceed the sum of $3000.00.' But he made no formal finding to this effect and we think that if he had done so we would have been compelled to set it aside as clearly erroneous. For there is no basis in the evidence for concluding that the plaintiff will suffer pecuniary loss of as much as $3000.00 as a result of his expulsion from Local 103."

The cases of *Pingston* v. *Brotherhood of Local Firemen and Enginemen,* 69 F. (2nd) 600 (1934); *Central Mexico Light and Power Company* v. *Munch,* 116 F. (2nd) 85; *Division 525, Order of Railway Conductors of America* v. *Garmon,* 133 F. (2nd) 273; *Bell* v. *Preferred Life Assurance Society of Montgomery,* 131 F. (2nd) 516, establish the following propositions of law: 1. That a valuation must be placed on plaintiff's interest in a suit for injunction, the test being no different in this type of action than in any other. 2. That the test in determining the Federal Court's jurisdiction is the value of plaintiff's interest rather than the total value of assets held jointly by defendants and plaintiffs. 3. That even in a class suit seeking injunctive relief, aggregation of individual interests is needed to meet the required jurisdictional amount. 4. Where two or more plaintiffs have separate and distinct demands in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount. If several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, then they must aggregate the amount of interest in order to arrive at the required jurisdictional amount. 5. In the absence of any attempt by

plaintiff to comply with the rule with regard to class actions, the Court will not, indeed, cannot, by in effect rewriting his petition for him, convert the suit which he brought as an individual suit on his own behalf into a class suit on behalf of the organization.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT A DECISION ON AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The sole question presented by the petition for a writ of certiorari is one of federal procedure and jurisdiction, and in no way relates itself to local law.

As heretofore pointed out, the petitioners would make it appear that an adverse ruling on the question involved, namely jurisdictional amount, would seriously injure and affect the role of trade unions in the national life of the country. The issue actually is whether the Federal Court was the proper forum wherein to bring the present action, if a class action could not be maintained. The facts clearly establish that the State Court was open to the petitioner. A State Court action was brought wherein all of the parties were present and all of the questions involved were presented.

The petitioners would further make it appear that the holding of the Circuit Court of Appeals was to the effect that the interest of the individual members in the union assets were severable and divisible, as a result of which ruling the collective strength of these assets would be destroyed. The Court made no such holding. It did hold that in order for the plaintiff to bring an action wherein he sought to represent the members of a class he must join with him a sufficient number of members to establish

the requisite jurisdictional amount or bring a true class action. Rule 23A of the Federal Rules as applied to the present state of facts would fail to serve its purpose if the plaintiff could bring the type of action which he sought to bring without compliance with the rule. The present action was brought by a member of an unincorporated association wherein there existed sharply divided opinions. The plaintiff could not hold himself out as representing a class in order to aggregate the interest of said class to arrive at the necessary jurisdictional amount unless he brought a true class action.

As pointed out by Judge Merris in the *Giordano* case, *supra,*

> "It is true as the plaintiff argues that the membership of an unincorporated labor union may constitute a class on whose behalf representatives may bring a true class suit to vindicate the common rights of the members as such. But Civil Procedure Rule 23A provides that the representatives of the class who bring the suit must be such 'as will fairly insure the adequate representation of all.' "

In another portion of his opinion he states,

> "In a true class suit, the plaintiffs stand in judgment for the class and a judgment for and against the plaintiffs benefits or binds each member of the class personally under the principles of *res judicata.* The members of the class must therefore be capable of definite identification as being in or out of it. Such identification would not be possible in a case such as this of fluid, factional groups in a labor union."

The petitioners seek to modify the rules governing class actions and jurisdictional amount so that labor unions or trade unions would be an exception to them in order to establish jurisdiction with the Federal Court. To establish the exception requires warping the holding of the Circuit Court of Appeals by indicating that the decision

is an attempt to carve out an individual's interest from the union's assets, thereby destroying the collective strength of the union. That is to say, he would make it appear that the holding of the Circuit Court of Appeals is to the effect that the interest of the petitioner in the fund must be subject to division amongst the members of the union in order to find that the objection of jurisdictional amount is valid. The decision of the Circuit Court of Appeals is to the contrary. They simply hold that where many people have an interest in a joint fund, a class action must be brought in order to aggregate the interest of the individuals in said fund for purposes of jurisdiction.

III.

THE DECISION IN THE PRESENT CASE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT. NEITHER IS THE DECISION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Since there is not here involved a question concerning the interpretation of a federal law but only a question of federal jurisdiction or procedural law, the foregoing reason for the denial of the petition requires no further discussion. The discussion of the second proposition, namely that the decision is not in conflict with the applicable decisions of this Court, falls into two categories. First, those cases of the Supreme Court directly dealing with the question of jurisdictional amount and secondly, the authority related to the proposition that the Circuit Court of Appeals had a right to hold the injunction void for want of jurisdiction, and thereby reverse the contempt order.

The case of *McNutt* v. *General Motors Acceptance Corporation of Indiana*, 298 U. S. 178 holds, "the burden of proving that the requisite jurisdictional amount is involved is on the one who asserts it and not on the one who challenges the jurisdiction of the Court." The respond-

ents in the present case filed their motion to dismiss the action immediately after the filing of the complaint on the basis that the Court did not have jurisdiction since the requisite jurisdictional amount of Three Thousand ($3,000.00) Dollars was not in controversy. No evidence was taken by the Court to support this proposition. Thereafter the respondents in their answer controverted the allegation in the plaintiff's complaint as to jurisdictional amount. As the Circuit Court of Appeals points out, there was a complete failure on the part of the plaintiff to establish the necessary jurisdictional amount in the injunction action. In this same connection, the case of *Parker* v. *Merrill,* 106 U. S. 1; 27 Law. Ed. 72, stands for the proposition that in an action brought by an individual involving jointly held property, the action not being brought on behalf of a class, the interest of all the owners of the property involved may not be aggregated to determine the amount in controversy. The case of *Neirbo Company* v. *Bethlehem Ship Building Company,* 308 U. S. 165; 84 Law. Ed. 167, holds that jurisdiction of Federal Courts is a grant of authority to them by Congress and is thus beyond the scope of litigants to confer. In the case of *K.V.O.S., Inc. v. Associated Press,* 229 U. S. 269, the holding is where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support these allegations by proof. See also the following cases of the Supreme Court with reference to the ascertainment of the question of jurisdictional amount. *Glenwood L. T. & Water Company* v. *Mutual Heat and Power Company,* 239 U. S. 121; 60 Law Ed. 174; *Parker* v. *Merrill,* 106 U. S. 1; 27 Law Ed. 72; *Brotherhood* v. *Pingston,* 293 U. S. 96.

It should carefully be noted that this is a civil contempt proceedings. There is a marked difference between criminal and civil contempt. In civil contempt the dignity of the Court is not being vindicated. It only seeks to protect

a property right of the plaintiff or the civil rights of the litigants. In criminal contempt you are not protecting a property right *per se*. It therefore becomes apparent that in considering the question of jurisdictional amount as it relates to the original injunction order and the right of the Circuit Court of Appeals to vacate that order, we must consider the distinctions between criminal and civil contempt. In the case of *Gompers* v. *Buck Stove & Range Company,* 221 U. S. 418, 55 Law Ed. 797, the differences between criminal and civil contempt are carefully defined. The case of *Carter* v. *U. S.,* 135 F. (2nd) 858, further points out that proceedings for civil contempt are between the original parties and are instituted and tried as part of the main cause. The proceedings for criminal contempt are between the public and the defendant and are not part of the original cause.

In a comprehensive annotation appearing in 12 A. L. R. (2nd Series) 1064, the question of the lack of jurisdiction of the Court in granting the injunction as it relates to the validity of the contempt order is fully considered. The writer states (page 1067), "subject only to one or two exceptions to be noted later, (*infra,* 5 and 6), by an almost unbroken line of authority and unanimous consensus of judicial opinion, the rule may be said to be firmly established that a Court does not possess the right or power to punish as for contempt a disregard or violation of its order or decree which it has rendered without jurisdiction over the subject matter or the parties or without power or authority to render the particular decree or order. Lack of such jurisdiction or power may therefore be raised by the person charged with contempt for violation of the order of decree (for the annulment or reversal of which he has taken no direct steps) in a collateral proceeding on appeal from the judgment of conviction for contempt or upon an application for habeas corpus to test the validity of the

imprisonment for contempt." Thereafter, in the annotation there appears a volume of authority citing decisions of this Court and Circuit Courts of Appeal in support of this proposition. The two exceptions to the rule are set out clearly in the annotation. The present case does not fall within these exceptions.

The case of *Abbott* v. *Eastern Massachusetts St. Ry. Co.*, 19 F. (2nd) 463, decided by the First Circuit Court of Appeals on June 4, 1927, is a case wherein the plaintiff in his bill did not adequately establish federal jurisdiction by failing to properly state the allegations with reference to diversity of citizenship and the amount involved. The Court held that, "The District Court being without authority to issue the injunction, the contempt decree is invalid and must be reversed and the case remanded to the District Court with directions to dismiss the attachment proceeding and to dismiss the bill for an injunction unless amended so as to confer jurisdiction." In the case at bar, the plaintiff alleged in his petition that the requisite jurisdictional amount was present, however, a motion attacking this allegation was immediately addressed to it. The Court failed to take evidence on the question on jurisdictional amount and there was a complete failure of proof of the same in the suit for injunction or in the civil contempt proceeding.

The petitioner places much reliance on the case, *United States* v. *United Mine Workers of America* (1947), 330 U. S. 258; 91 Law Ed. 884; 67 Supreme Court 677, but obviously misapplies and misinterprets the holding of this case. The following quotation from the opinion clearly establishes the correct rule. "It does not follow, of course, that simply because the defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for

civil contempt based on a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued, (citing cases), and *a fortiori,* when the injunction or restraining order was beyond the jurisdiction of the Court. Nor does the reason underlying *U. S.* v. *Shipp* compel a different result. If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety."

"Assuming then that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4th and the judgment for civil contempt; but we would subject to any infirmities in the contempt proceedings or in the fines imposed, affirm the judgments for criminal contempt as validly punishing violations of an order then outstanding and unreversed."

As pointed out in the annotation in 12 ALR (2nd) 1077, hereinbefore referred to, "The Courts have seldom drawn a distinction between criminal contempt which is a measure to maintain the dignity of the Court, and a civil contempt which is resorted to merely compensate the plaintiff for the damage he has suffered by reason of the defendant's violation or disregard of the order. The United States Supreme Court, however, in a recent case, has made this distinction, taking the view that at least so far as concerns a temporary restraining order made for the purpose of preserving existing conditions pending determination of the Court's jurisdiction, the order or decree must be obeyed on pain of criminal contempt (as distinguished from civil contempt) even though the attack thereon is on jurisdictional grounds, until the jurisdictional question may be determined at least when the basis of the assertion of jurisdiction is not frivolous but substantial. (Citing *U. S.* v. *United Mine Workers,* 330 U. S. 258.) This position

is made to rest on the ground that the fact that a Court's jurisdiction to grant ancillary injunctive relief sought is open to question does not affect the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction. * * * And distinguishing a civil contempt the Court further held that it did not follow simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order; but in such case the right to remedial relief falls with an injunction which events prove was erroneously issued."

The foregoing authority establishes without question that the Circuit Court of Appeals properly held that the civil contempt decree must fall upon the finding that the final injunction was issued without the Court having jurisdiction.

In this same connection see the cases of *Ex parte Edward T. Young, petitioner*, 209 U. S. 122; 52 Law Ed. 714 and also in the matter of *Clinton B. Fisk, petitioner*, 113 U. S. 713; 28 Law Ed. 1117.

IV.

THE CIRCUIT COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOCAL COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Plaintiff, a member of Local 901 UE, affiliated with the CIO brought his action individually and not as a representative of a class. He was a member of a union having over 4000 members in which union the majority of the members were not in sympathy with his position. Plain-

tiff did not seek to join the Local or the International as parties plaintiff or defendant. The jurisdiction of Federal Courts in diversity cases depends upon whether the amount in controversy exceeds Three Thousand ($3,000.00) Dollars exclusive of interest and costs. The plaintiff claims the invasion of a right which he seeks to prevent by injunction. The value of the challenged right determines the amount in controversy. The decision of the Circuit Court of Appeals in the case at bar correctly interprets the law as set forth in Title 28 U. S. C. A. Sec. 1332 and as interpreted by cases of other Circuit Courts of Appeals and of this Court.

The only question presented by this writ predicated upon the decision of the Circuit Court of Appeals is whether or not the plaintiff brought his action properly. A determination of this question in no way affects the role of trade unions in America or the law applicable to said associations.

Wherefore, respondents respectfully submit that for the reasons heretofore set forth, the writ for Certiorari should be denied.

Respectfully submitted,

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